(12)

No. 961

In the Supreme Court of the United States

October Term, 1943.

RALPH W. WHITE, ADMINISTRATOR OF THE ESTATE OF MARY VIEUX BRUNO, DECEASED; JOHN A. BRUNO, ETHEL BRUNO SHOPWETUCK, MARY BRUNO WEBB, OSE BRUNO DE LONAIS, NORA BRUNO KEMOHAH, JOHN A. BRUNO, JR., AND EVELINE BRUNO CODY, *Petitioners,*

vs.

SINCLAIR PRAIRIE OIL COMPANY, A CORPORATION; THE PRAIRIE OIL AND GAS COMPANY, A CORPORATION; MID-KANSAS OIL AND GAS COMPANY, A CORPORATION, AND THE OHIO OIL COMPANY, A CORPORATION, *Respondents.*

Brief of Respondents in Opposition to Petition for Writ of Certiorari.

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IN THE SUPREME COURT OF THE UNITED STATES.
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Ralph W. White, Administrator of the Estate of Mary Vieux Bruno, deceased; John A. Bruno, Ethel Bruno Shopwetuck, Mary Bruno Webb, Ose Bruno DeLonais, Nora Bruno Kemohah, John A. Bruno, Jr., and Eveline Bruno Cody,
Petitioners,
vs.
Sinclair Prairie Oil Company, a corporation; The Prairie Oil and Gas Company, a corporation; Mid-Kansas Oil and Gas Company, a corporation, and the Ohio Oil Company, a corporation, ***Respondents.***

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*.

Respondents believe that petitioners' statement of the questions presented and of the facts does not set forth fully, clearly and sufficiently the record and facts to be considered in order to determine the questions involved and therefore submit the following supplemental statement:

Supplemental Statement.

The approval by the Secretary of the Interior on November 21, 1903, of the deed executed on March 19, 1903, by John Bruno to Mary Bruno, conveying the eighty acres of

land involved in this action, was under the Act of Congress of August 15, 1894 (28 Stats. 286), which Act of Congress provided,

> "That upon the approval of such deed by the Secretary of the Interior the title to the land thereby conveyed shall vest in the grantee therein named and the land sold and conveyed under the provisions of this Act shall upon proper recording of deeds therefor be subject to taxation as other lands in said Territory,"

and the deed from John Bruno to Mary Bruno so approved by the Secretary of the Interior under the Act of Congress aforesaid was delivered to the grantee and placed of record on the deed records of Pottawatomie County, Oklahoma, on March 4, 1904. The approval thereof by the Secretary of the Interior was not inadvertently made but was regularly made and valid as found and determined by the Supreme Court of Oklahoma in *Bruno* v. *Getzelman*, 70 Okl. 143, 146, 173 Pac. 850, and by the United States Circuit Court of Appeals for the Tenth Circuit in *United States of America* v. *Getzelman*, 89 F. (2d) 531, *certiorari* denied, 302 U. S. 708, 82 L. ed. 547, and by the United States Circuit Court of Appeals for the Tenth Circuit in this action, 139 F. (2d) 103.

The oil and gas leases, one to The Prairie Oil & Gas Company, executed by W. H. Desmond on June 8, 1925 (R. 18), and the other by B. C. Getzelman and wife, *et al.*, to Omer McKown of date July 22, 1926 (R. 21), both contained general warranties of title in words as follows:

> "Lessor hereby warrants and agrees to defend the title to the lands herein described * * *." (R. 21 and 24)

and each of said leases further contained a lesser interest clause substantially in words as follows:

> "If said lessor owns a less interest in the above described land than the entire and undivided fee simple

estate therein, then the royalties and rentals herein provided shall be paid the lessor only in the proportion which its interest bears to the whole undivided fee." (R. 20 and 23)

And by adopting and ratifying said leases by contract of settlement (Ex. "C," R. 25), Mary Bruno and John Bruno, their heirs, executors, administrators and assigns, became bound by the terms thereof.

Respondents in this action complied with the provisions of the contract of settlement (Ex. "C", R. 25) in all respects by making payment of the cash consideration provided for therein and upon the denial by the Supreme Court of the United States of writ of *certiorari* in the action of *United States of America* v. *Getzelman, et al.*, made distribution of the impounded royalties and thereafter the royalties accruing under said leases to the lessors in said leases, their grantees and assigns (R. 54 and 111) in good faith and in full reliance on the binding force and effect of the provisions of said leases and of the judgment in said action.

The action instituted by the *United States of America*, as plaintiff, v. *B. C. Getzelman, W. H. Desmond, et al., supra*, was brought by the United States on request of the Secretary of the Interior and by direction of the Attorney General (R. 58) on its own behalf and in behalf of Mary Bruno, the purpose of said action being to establish Mary Bruno's title, to obtain an accounting of royalties under the oil and gas leases which had been impounded and to obtain a decree adjudging her to be entitled to the impounded royalties and future royalties to accrue under such leases.

BRIEF.

Therefore, the question presented in this case for consideration is not "whether a contract of compromise and settlement bottomed on forbearance in the matter of filing suit could be invalidated by separate litigation as to title initiated approximately five years subsequent to the execution of the contract" (petition for writ of *certiorari* and brief in support thereof of petitioners, page 9), but is simply whether the lower courts have correctly construed and applied the contract of settlement as between the plaintiffs and respondents.

The sole specification of error assigned by petitioners is that the United States Circuit Court of Appeals for the Tenth Circuit erred in ruling that a contract of compromise and settlement with respect to the matter of forbearing from filing suit to collect Indian oil land royalties would be invalidated by subsequent litigation determining that the claimants of the royalties had no right, title or interest in the lands in question. No such effect can be given to the determination of the trial court, and the decision of the United States Circuit Court of Appeals for the Tenth Circuit. Each of said Courts found and determined that the petitioners under the contract of settlement and under the provisions of the oil and gas mining leases ratified and adopted thereby had no right of recovery and that any such right they might have had was adjudicated against them by the prior decisions. *Bruno, et al.*, v. *Getzelman, et al., supra; United States* v. *Getzelman, supra.*

The decision of the United States Circuit Court of Appeals for the Eighth Circuit in *Kiefer Oil & Gas Co.* v. *Mc-*

Dougal, 229 Fed. 933, relied upon by petitioners, is without application, for in that case the oil and gas lease was not adopted but was made separately by an adverse claimant to the land and as a part of a compromise settlement. The lessee in said lease firmly bound itself to pay a stated sum to the lessor as bonus and a stated royalty without regard to the character of lessor's title, there being no warranty of title of any kind contained in the lease involved therein. Said lease evidenced the firm commitment and consideration agreed to be paid therefor by Kiefer Oil & Gas Company to McDougal independently of the other leases held by it from other claimants.

There is no parallel as between the facts in the *Kiefer* case and the facts in this action. The petitioners by the provisions of the contract of settlement (R. 25) ratified, adopted and approved the oil and gas leases held by the respondents as fully as though they had originally executed such leases at the date of the execution thereof and for the consideration paid therefor, so that the petitioners and their predecessors in interest should have no further claims of any kind or character except as to the royalty to be paid under the oil and gas leases held by the respondents, which royalties the petitioners reserved their right to make claim to, and such was the holding of the trial court and the holding of the Circuit Court of Appeals for the Tenth Circuit.

The Supreme Court of the State of Okahoma in the case of *Bruno, et al.,* v. *Getzelman, et al., supra,* had decided that the deed from John Bruno to Mary Bruno was valid and effective, however since the United States was not a party to said action and not bound by the decision the question remained open as to whether or not if the United States should institute an action the courts of the United States

would see fit to follow the rule announced by the state court. The United States did thereafter file an action, *United States of America* v. *Getzelman, et al., supra,* setting up generally the record with respect to the action taken by the Department of the Interior in reference to the allotment of land to John Bruno and Mary Bruno, the effect of the deed from John Bruno to Mary Bruno and the attempted reallotment of said land to Mary Bruno and the facts with respect to the execution of the oil and gas leases and mineral deeds covering the royalty interest of the lessors in said leases and seeking the recovery of the impounded royalties and the royalties to accrue under said leases on behalf of Mary Bruno, there clearly being placed in issue by the allegations of the amended bill of complaint (R. 58) all rights, titles and interest that Mary Bruno might have or claim to have in the lands, the rents and the royalties emanating therefrom and in the impounded royalties in the hands of respondents. The final determination of this action brought by the United States on behalf of Mary Bruno was not only binding upon the United States but upon Mary Bruno as well and constituted an adjudication as against petitioners in this action.

—*Heckman* v. *United States,* 224 U. S. 413, 56 L. ed. 820;

Bryan County, Okla., et al., v. *United States,* 123 F. (2d) 782, *certiorari* denied 62 S. Ct. 907, 86 L. ed. 1216;

Privett v. *United States,* 256 U. S. 201, 41 S. Ct. 455, 65 L. ed. 889;

United States v. *Candelaria,* 271 U. S. 402, 46 S. Ct. 561, 70 L. ed. 1023;

Mars, et al., v. *McDougal, et al.,* 40 F. (2d) 247, *certiorari* denied, 282 U. S. 850, 75 L. ed. 753.

The trial court and the Circuit Court of Appeals for the Tenth Circuit correctly construed and applied the provisions of the contract of settlement (Ex. "C", R. 25) and the petitioners in their brief (p. 20) concede that the instrument thereafter executed by John Bruno and Mary Bruno (Ex. "D", R. 27) in nowise tended to alter or modify the provisions of Exhibit "C" but to insure the binding effect thereof. There was no agreement contained in Exhibit "C" by which the respondents were to pay any royalties other than those payable under the terms of the oil and gas leases, it being expressly stipulated therein that the only claim which the Brunos retained under Exhibit "C" (R. 25) was the right to claim royalties to be paid under said leases—that is according to the terms of said leases. Having adopted said leases, the Brunos were bound by the lesser interest clause therein and subscribed to the covenant of warranty of title contained in said leases. The effect of the lesser interest clause has been determined by the Supreme Court of Oklahoma in *Hooks* v. *Rocket Oil Co.,* 191 Okl. 431, 130 P. (2d) 846, and by the District Court of the United States for the Eastern District of Illinois in *Koval* v. *Carnahan, et al.,* 45 Fed. Supp. 357. Under the authority of these decisions it is not open to question that the construction placed upon the contract (Exhibit "C") by the trial court and by the Circuit Court of Appeals for the Tenth Circuit was correct, that petitioners had no interest in the royalties to be paid under said leases and that there was no contract or commitment on the part of the lessees, the respondents, to pay a royalty of one-eighth in addition to the royalty prescribed under the terms of said leases. *United Carbon Co., et al.,* v. *Maynard,* (Court of Appeals of Kentucky) 284 Ky. 823, 146 S. W. (2d) 45.

Inasmuch as the United States in the action filed by it on behalf of Mary Bruno asserted on behalf of Mary Bruno the right to all the oil and gas, including all royalties impounded or to be paid under the oil and gas leases of respondents, it does not admit of doubt that petitioners' present claim to a royalty of one-eighth of the oil to be produced under said leases was involved in said action even though the contract sued on by petitioners in this action was not specifically pleaded by the United States in its amended bill of complaint filed in the action instituted by it. The United States was fully informed as to the existence and contents of Exhibits "C" and "D" at the time of the filing of said action for Exhibit "D" was dated March 14, 1930, and approved by the Secretary of the Interior May 2, 1930, and the action by the *United States of America,* as plaintiff, v. *B. C. Getzelman, et al.,* as defendants, *supra,* was filed in the United States District Court for the Western District of Oklahoma on November 2, 1933. The conclusion, therefore, is unescapable that the United States of America was fully cognizant of the terms and provisions of Exhibit "C" and Exhibit "D" and that therefore the judgment in said action adjudicated and disposed of the claim of petitioners herein. *Vinson* v. *Graham,* 44 F. (2d) 778.

The petitioners attempt to create an exception or reservation by the language used in the contract of settlement, Exhibit "C" (R. 25) which reserves to them the right to claim royalties to be paid under the oil and gas leases, it being established by the decisions in the *Getzelman* cases, *supra,* that Mary Bruno and John Bruno had no title to the land involved or any part thereof, and an attempt to so create an exception or reservation must fail primarily for the reason that no such exception or reservation was made or intended to be made by the language used and even if proper

nguage had been made use of to express a reservation or xception still it must fail for the reason that to be effectual here must be a subject matter on which such reservation or xception can operate, and since John Bruno and Mary Bruo had no title to the land involved and no interest in the oyalties to be paid under said oil and gas leases the lanuage relied upon could not have the effect of vesting in hem the right to such royalties because they had no estate n either land or royalties out of which such reservation or xception could arise. The rule in this respect is stated in 6 C. J. S. 446, Sec. 139, as follows:

> "An exception or reservation is void where there is nothing for either to operate on or where the grantor had no interest or estate in the thing excepted. A reservation or exception can only be out of the estate granted. A reservation to be effective as such must refer to something conveyed and an exception must be a part of the thing granted and not of some other thing."

Conclusion.

Respondents, respectfully represent that the decisions rrived at by the trial court and by the Circuit Court of Appeals for the Tenth Circuit are correct under the authorties and reasons herein and therein set forth and that no ubstantial or meritorious question is presented for review nd therefore the petition for writ of *certiorari* should be enied.

Dated this 25th day of May, 1944.

Respectfully submitted,

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